Petition

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ALEXANDER L. STEVAS,
CLERK

81-448

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ROBERT O. WILSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September 2, 1981

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QUESTION PRESENTED

Whether, reviewing the evidence in the light most favorable to the prosecution, a reasonable juror could have concluded beyond a reasonable doubt that defendant devised a scheme or artifice to defraud his insurance company and that he placed certain documents in the mail for the purpose of executing such scheme.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Robert O. Wilson, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 2, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is annexed hereto as Appendix A. The judgment of the District Court is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 2, 1981. This petition for certiorari was filed within sixty (60) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment V

> **Criminal actions – Provisions concerning – Due process of law and just compensation clauses.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any persons be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment XIV

> **Citizenship – Due process of law – Equal protection.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1341

Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use of any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

STATEMENT OF THE CASE

Robert O. Wilson was charged in a four-count indictment with mail fraud, 18 U.S.C. § 1341, relating to claims to his insurance company for damaged and stolen equipment. The jury acquitted Wilson on the first two counts and convicted him of the remaining counts, which related to claims for damage to two pickup trucks and the theft of an office trailer and a Wabco scraper.

Defendant was sentenced to one year and fined $1,000.00 on count III and a three-year probation and $1,000.00 fine on count IV. The Sixth Circuit affirmed, concluding that the evidence was sufficient to support the conviction.

The proof at trial showed that during the year of 1976, Wilson was president of a company that owned two remotely located strip mining operations in Van Buren County, Tennessee. In the fall of that year, defendant instructed an employee to move all the equipment to one site until spring, which the employee did not do. Subsequently, Wilson's company entered into a chapter 11 bankruptcy, causing several items to be repossessed. The remaining equipment, which supposedly had been moved to one site, was to have been retrieved.

In May, 1977, Wilson learned that all of the equipment had been retrieved with the exception of a Wabco scraper; an office trailer; two pickup trucks; and a John Deere tractor, which was never recovered. Wilson filed claims with his insurance company relating to the above-described equipment, which was the subject of counts III and IV of the indictment.

With regard to the pickup trucks, Wilson initially filed a claim stating that the vehicles had been stolen. However, immediately upon learning that the trucks had not been stolen, but only vandalized, Wilson notified his insurance company and sought reimbursement only for damage to the trucks. The government argued in the face of this clear evidence contradicting an intent to defraud, that Wilson had fraudulently sought to recover for normal damage to the trucks not caused by vandals. On this issue, the insurance adjuster testified that he had inspected the trucks and had concluded that the vandalism claim was legitimate.

With regard to Wilson's claim for the theft of an on-site office trailer, the government argued that the serial number on the insurance claim differed from the actual number on the trailer, evidencing Wilson's intent to defraud. However, the variance is explainable in numerous ways; and, in fact, in itself supports no inference of wrong-doing. Further, the government argued that a document evidencing the subsequent transfer of the trailer to another corporation correctly recited the serial number. Again, the inferences that arise from this fact are predominantly innocent, not criminal.

Finally, the proof relating to Wilson's claim for the theft of the Wabco scraper showed that he had instructed an employee to move the scraper and all other equipment to one mine site, and that the employee had not done so, failing to inform Wilson of this fact. The only government witness proffered to support the conclusion that Wilson's insurance claim for the scraper was fraudulent was Mr. Hitchcock, who testified that he called Mr. Robert Wilson to discuss purchasing the scraper, that a Mr. Wilson returned the phone call and that they discussed the equipment. The inference that Wilson might have known the whereabouts of the scraper was negated by the testimony that Wilson had never spoken to Hitchcock on the phone; that Wilson's father, not defendant, had returned the call; and that defendant was not in Tennessee at the time of the phone call.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE CONSTITUTIONALLY REQUIRED QUANTUM OF PROOF NECESSARY TO SUPPORT A CONVICTION.

It is well settled that the due process clauses of the fifth and fourteenth amendments prohibit conviction except upon proof establishing guilt beyond a reasonable doubt. *E.g., Mullaney v. Wilbur,* 421 U.S. 684, 703, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *Cool v. United States,* 409 U.S. 100, 104, 93 S. Ct. 354, 34 L. Ed. 2d (1974) (per curiam). This due process guarantee is predicated upon the notion that, given the nature of our governmental system and the rights of individuals in relation to that system, it is better to err on the side of protecting individual liberty where doubt exists.

> [A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.[1]

While constitutionalizing the quantum of proof necessary to sustain a criminal conviction has created serious tension relative to the scope of review of the evidence, particularly in light of the historic reluctance of appellate courts to disturb jury findings, it is nonetheless true that this Court has recognized that the constitutional standard requiring proof beyond a reasonable doubt requires reversal of jury verdicts if the evidence upon which they are based does not satisfy the standard. *Jackson v.*

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[1] *In re Winship,* 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Virginia, 443 U.S. 307, 317 n.10 *and accompanying text*, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

In view of the foregoing burden, on appeal the court is required to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational truth of fact could have found the essential elements of the crime beyond a reasonable doubt."[2] 443 U.S. at 318-19.

While the *Jackson* standard does not impose an affirmative duty on the prosecution to rule out every hypothesis except that of guilt beyond a reasonable doubt, *e.g.*, *Holland v. United States*, 348 U.S. 121, 138-140, 75 S. Ct. 127, 99 L. Ed. 150 (1954); *United States v. Kirk*, 584 F.2d 773, 781 (6th Cir. 1978), *cert. denied*, 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 708 (1978); *United States v. Scales*, 464 F.2d 371, 373 (6th Cir. 1972), when the inferences to be drawn from the evidence are equally balanced between an innocent and a criminal explanation, the verdict cannot stand. *E.g.*, *United States v. Campion*, 560 F.2d 751, 753-54 (6th Cir. 1977).

While further clarification of the standard applied to evaluate the constitutional sufficiency of the evidence is difficult because the standard is largely dependent upon the facts of each case, some of the factual issues in cases reversed on the sufficiency of the evidence are analogous to those in the present record.

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[2]The standard announced in *Jackson*, a habeas corpus action raising the sufficiency of the evidence, also appears to be the standard applied upon direct appeal. *E.g.*, *United States v. Perez-Gomez*, 638 F.2d 215 (10th Cir. 1981); *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980); *United States v. Langhman*, 618 F.2d 1067 (4th Cir. 1980); *United States v. Fera*, 616 F.2d 590 (1st Cir. 1980).

First, it seems fairly clear that a conviction cannot be predicated upon inferences constituting "mere conjecture and suspicion." *United States v. Fitzharris*, 633 F.2d 416, 422-23 (5th Cir. 1980). As the fifth circuit stated in *Holloway v. McElroy*, 632 F.2d 605, 641 (5th Cir. 1980),

> [W]e do not believe that any rational factfinder could take these inconsistencies [in defendant's explanation] as a sufficient base upon which to pile inference on top of inference to reach beyond doubt the ultimate conclusion that the shooting was not in self defense.[3]

Second, in reviewing the evidence the jury may not infer fraudulent intent from facts that defendant candidly admits and that are inconsistent with such intent. *United States v. Kelley*, 630 F.2d 302, 307-08 (5th Cir. 1980); *cf. Bronston v. United States*, 409 U.S. 352, 35 5n. 3 *and accompanying text*, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973) (perjury conviction cannot be based upon truthful, but unresponsive answer to question). Finally, in reviewing the evidence the jury may not draw any inferences from transactions on which defendant was acquitted with reference to other counts of the indictment. *United States v. Kelley, supra*, 630 F.2d at 307-08.

Applying the foregoing to the facts in the present case, one must conclude that the Government did not establish the elements of 18 U.S.C. § 1341[4] beyond a reasonable

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[3] *See also, United States v. Higgins*, 545 F.2d 1009, 1012 (5th Cir. 1977), in which the court reversed a conviction for possessing counterfeit money with the intent to distribute because defendant made no attempt to exchange counterfeit monies for real currency, made no clear attempt to escape, made no attempt to destroy counterfeit bills, and was only in possession of three such bills.

[4] *See generally, United States v. Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, 425 U.S. 960, 96 S. Ct. 1742, 48 L. Ed. 2d 205 (1976).

doubt. First, Wilson withdrew his claim for the theft of his trucks when he learned of their whereabouts, an action totally at odds with the Government's contention that Wilson intended to defraud the Government. To rebut this, the Government asked the jury to infer from a mistakenly recorded serial number that the defendant acted improperly, an inference that can only be characterized as weak, at best. Second, the Government argued that the damage to the pickup trucks was caused by normal wear and tear, not vandalism, despite the testimony of the insurance claims adjuster to the contrary.

Third, the Government offered the testimony of a man who talked to a Mr. Wilson about the sale of one of the items of machinery on which a claim was filed.[5] However, the witness was not certain whether he talked to defendant or defendant's father, and defendant's father testified that he had returned the call to the witness.

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[5]The opinion of the Sixth Circuit mistakenly construes the record evidence on this issue, stating that the witness talked to defendant.

CONCLUSION

In conclusion, the proof of the government, which was wholly circumstantial and largely equivocal, does not overcome substantial evidence negating the argument that the defendant was acting fraudulently. For the reasons set out above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

BY: _____
CHARLES R. RAY

BY: _____
MICHAEL J. PASSINO

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(615) 244-2202

Counsel for Petitioner

September 2, 1981

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for a Writ of Certiorari has been mailed to the Honorable Robert Washko, Assistant United States Attorney, United States Courthouse, 801 Broadway, Nashville, Tennessee 37203 this _____ day of _____, 1981.

_____

CHARLES R. RAY

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-5217

[Filed: July 2, 1981]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT O. WILSON,
Defendant-Appellant.

Before: ENGEL, KENNEDY and MARTIN, Circuit Judges.

Defendant-appellant Robert O. Wilson appeals his conviction by a jury in the District Court for the Middle District of Tennessee of two counts of mail fraud, in violation of 18 U.S.C. § 1341. Appellant, the president of Petroleum Engineering Service, Inc., was charged in a four count indictment with: (1) Mailing a fraudulent claim for an Allis-Chalmers front end loader to his insurance company; (2) Causing a check for the front end loader to be mailed from the insurance company to Petroleum Engineering; (3) Mailing a fraudulent claim for certain pieces of equipment to the insurance company; (4) Causing a check for the equipment to be mailed to Petroleum Engineering. Appellant was acquitted on the first two counts and convicted on counts 3 and 4. He raises the following arguments on appeal:

that the jury's verdict is not supported by the evidence; that the District Court abused its discretion by allowing the prosecutor substantially more time in his rebuttal argument than defense counsel used in closing argument; that acquittal on counts 1 and 2 necessarily acquitted him on counts 3 and 4; that the District Court abused its discretion by not permitting the jury to take to the juryroom a copy of one witness' prior inconsistent statements to the grand jury.

We find the evidence sufficient to support the jury's verdict on counts 3 and 4. Appellant mailed a letter to the insurance company in May, 1977, claiming that a Wabco scraper and two pickup trucks were either stolen or vandalized. When the trucks were discovered he revised his insurance report to claim a loss due to vandalism. Appellant discussed his claims with an insurance agent in November, 1977, at which time he represented that the scraper was still missing but had been in good working order while in appellant's possession, and that prior to the vandalism the trucks had been in good or very good working order. Appellant received a check in the mail in satisfaction of his claims in December, 1977.

At trial, one witness testified that he inquired of Petroleum Engineering in June, 1977, about buying the scraper, and that a person who identified himself as Bob Wilson quoted a specific price. There was also testimony that throughout the relevant time period the scraper was in appellant's control at a job site. From this the jury could infer that appellant had knowledge that the scraper was not in fact missing. Two witnesses testified that the trucks were in very poor condition in December, 1976, and there was testimony that appellant saw the trucks at that time. There was testimony that pictures of the trucks' supposedly vandalized state, taken

by the insurance agent in November, 1977, accurately portrayed their condition in December, 1976, prior to the alleged loss. In addition, there was testimony that the scraper was inoperable before it was allegedly stolen. This evidence is sufficient to support a verdict that appellant used the mails to defraud the insurance company as charged in counts 3 and 4.

We have considered appellant's remaining arguments and find them to be without merit. Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX B

United States of America vs.

United States District Court for

DEFENDANT: ROBERT O. WILSON

MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DOCKET NO. 80-30010

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: JULY DAY: 01, YEAR: 1980

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL CHARLES RAY and JUDE LENAHAN, ESQUIRES
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [XX] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of [XX] NOT GUILTY. Defendant is discharged COUNTS ONE AND TWO
[XX] GUILTY. COUNTS THREE AND FOUR

Defendant has been convicted as charged of the offense(s) of

Title 18, United States Code, Section 1341

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

ONE (1) YEAR and FINED THE SUM OF ONE THOUSAND DOLLARS ($1,000.00) ON COUNT THREE.

ON COUNT FOUR, IT IS ADJUDGED THAT IMPOSITION OF SENTENCE AS TO IMPRISONMENT IS SUSPENDED AND THE DEFENDANT PLACED ON SUPERVISED PROBATION FOR A PERIOD OF THREE (3) YEARS AND FINED THE SUM OF ONE THOUSAND DOLLARS ($1,000.00). SAID PROBATIONARY PERIOD SHALL COMMENCE FOLLOWING SERVICE OF THE TERM OF IMPRISONMENT IMPOSED ON COUNT THREE.

SPECIAL CONDITIONS OF PROBATION

THE DEFENDANT IS ALLOWED TO REMAIN ON HIS PRESENT BOND PENDING APPEAL.

RECEIVED FOR ENTRY
2:30 P.M. JULY 2, 1980
JULIA B. CROSS, CLERK
D July 2, 1980
By Jessa Hosch

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE 7-3-80
BY Jessa Hosch
( ) CLERK
(X) DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

L. CLURE MORTON, CHIEF JUDGE July 2, 1980
Date

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